

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of April, two thousand eight.

PRESENT:

HON. CHESTER J. STRAUB,
HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,
Circuit Judges.

JI XI QIU,

Petitioner,

v.

No. 07-3393-ag (NAC)

UNITED STATES ATTORNEY GENERAL,

Respondent.

FOR PETITIONER: Gang Zhou, New York, New York.

FOR RESPONDENT: Jeffrey S. Bucholtz, Acting Assistant Attorney General; Mark C. Walters, Assistant Director; Julie M. Iversen, Senior Litigation Counsel, Office of Immigration Litigation, U.S. Department of Justice, Washington, D.C.

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4 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, and
5 DECREED that the petition for review is GRANTED, the BIA's order is VACATED, and the
6 case is REMANDED to the BIA for further proceedings consistent with this decision.
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10 Ji Xi Qiu, a native and citizen of the People's Republic of China, seeks review of a July
11 10, 2007 order of the BIA affirming the May 11, 2006 decision of Immigration Judge ("IJ")
12 George T. Chew, denying his application for asylum and withholding of removal. *In re Ji Xi Qiu*,
13 No. A79 458 323 (B.I.A. Jul. 10, 2007), *aff'g* No. A79 458 323 (Immig. Ct. N.Y. City May 11,
14 2006). We assume the parties' familiarity with the underlying facts and procedural history of this
15 case.

16 When, as here, the BIA issues a detailed opinion, affirming the IJ's decision and
17 supplementing it, we review the BIA's opinion. *Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir.
18 2005). We review the agency's factual findings under the substantial evidence standard, and
19 treat them as "conclusive unless any reasonable adjudicator would be compelled to conclude to
20 the contrary." 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Manzur v. U.S. Dep't of Homeland Sec.*, 494
21 F.3d 281, 289 (2d Cir. 2007). However, we will vacate and remand for new findings if the
22 agency's reasoning or its fact-finding process was sufficiently flawed. *Cao He Lin v. U.S. Dep't*
23 *of Justice*, 428 F.3d 395, 406 (2d Cir. 2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d Cir.
24 2004). We review *de novo* questions of law and the application of law to undisputed fact. *See,*
25 *e.g., Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

26 The BIA erred in independently assessing the record to find that Qiu's encounter with the
27 family planning officials did not constitute past persecution and that his response did not
28 constitute "other resistance" to the family planning policies. *See Shi Liang Lin v. U.S. Dep't of*
29 *Justice*, 494 F.3d 296, 309-10 (2d Cir.2007) (en banc) (citing 8 U.S.C. § 1101(a)(42) (holding
30 that while an alien is not *per se* eligible for asylum based on the forced abortion or sterilization of
31 his wife by traditional marriage, he may establish eligibility for asylum by demonstrating "other

1 resistance to a coercive population control program” or “a well founded fear that he or she will
2 be . . . subject to persecution for such . . . resistance. . .”). For all appeals filed after September
3 25, 2002, the BIA is no longer permitted to engage in *de novo* review of an IJ’s factual findings.
4 See 8 C.F.R. §§ 1003.1(d)(3)(i),(iv); *In re S-H-*, 23 I. & N. Dec. 462, 466 (B.I.A. 2002). Rather,
5 “[f]acts determined by the immigration judge, including findings as to the credibility of
6 testimony, shall be reviewed only to determine whether the findings of the immigration judge are
7 clearly erroneous.” 8 C.F.R. §§ 1003.1(d)(3)(i), (iv). The BIA’s independent assessment of
8 portions of the record not relied on by the IJ, as occurred in this case, is classic *de novo* review,
9 which constitutes legal error and requires remand. See *Fen Yong Chen v. Bureau of Citizenship*
10 *& Immigration Servs.*, 470 F.3d 509, 515 (2d Cir. 2006) (review of record which independently
11 assessed petitioner’s credibility without giving deference to the findings of the IJ was legal error
12 which required remand); cf. *Belortaja v. Gonzales*, 484 F.3d 619, 625 (2d Cir. 2007) (BIA’s
13 adverse credibility determination based on a factual determination made upon *de novo* review of
14 the existing record was permissible under the pre-2002 regulations); *Xian Tuan Ye v. Dep’t of*
15 *Homeland Sec.*, 446 F.3d 289, 296 (2d Cir. 2006) (holding that the BIA did not engage in
16 improper fact-finding when it emphasized the IJ’s finding of an omission which was already in
17 the record).

18 Moreover, we cannot say that remand would be futile here because of the numerous
19 errors committed by the agency. Cf. *Cao He Lin*, 428 F.3d at 401. First, the agency erred in
20 failing to consider record evidence relevant to the question of whether Qiu “resisted” the Chinese
21 family planning policy and whether he suffered past persecution. See 8 U.S.C. § 1101(a)(42); see
22 also *Tian-Yong Chen*, 359 F.3d at 128. In finding that Qiu’s actions did not constitute
23 “resistance” to that policy and that he was not persecuted, the agency failed to consider plainly
24 material evidence regarding, inter alia, a physical confrontation between Qiu and family planning
25 cadres, Qiu’s detention, and a subsequent verbal confrontation between Qiu and family planning

1 cadres at the Family Planning Board the day after his wife was forced to abort a pregnancy and
2 sterilized, at which confrontation he was told he was being penalized for resisting and
3 obstructing family planning regulations. *See Tian-Yong Chen*, 359 F.3d at 128.

4 Second, the BIA's finding that Qiu's fear of sterilization is not objectively reasonable
5 even assuming he engaged in and was persecuted for "other resistance," was erroneous as it
6 failed to shift the burden to the government. Where an alien's testimony has established past
7 persecution, a presumption of well-founded fear of future persecution arises, at which point the
8 burden shifts to the government to show otherwise. *See* 8 C.F.R. § 208.13(b)(1)(ii). In addition,
9 in rejecting Qiu's claim of a well-founded fear of persecution due to lack of "evidence that the
10 cadres have demonstrated any ongoing interest in [Qiu]," the BIA failed to take into account that
11 Qui may base a claim of future persecution on "a pattern or practice" in China "of persecution of
12 a group of persons similarly situated" to him. 8 C.F.R. § 208.13(b)(2)(iii). Moreover, Qiu's
13 testimony that the family planning authorities sterilized his wife in order to punish him lends
14 credence to his claim that they sought to persecute him. The BIA's hypothesis that the previous
15 sterilization of Qiu's wife makes it unlikely for the family planning authorities to carry out their
16 threat to sterilize Qui constituted impermissible speculation. *See Cao He Lin*, 428 F.3d at 405
17 (holding that "absent record evidence of practices in foreign countries, the IJ must not speculate
18 as to the existence or nature of such practices").

19 For the foregoing reasons, the petition for review is GRANTED, the BIA's order is
20 VACATED, and the case is REMANDED to the BIA for further proceedings consistent with this
21 decision. As we have completed our review, Qui's pending motion for a stay of removal in this
22 petition is DENIED as moot.

23 FOR THE COURT:
24 Catherine O'Hagan Wolfe, Clerk

25 By: _____
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